UPREME COURT, U. S.

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No. 808

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

THE AMERICAN WATERWAYS OPERATORS, INC.,
*Appellant,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY, ET AL.,
*Appellees.*

**On Appeal From the United States District Court for the Western District of Kentucky at Louisville**

## REPLY BRIEF FOR THE AMERICAN WATERWAYS OPERATORS, INC.

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1. The railroads' counsel have simplified this Court's task by conceding that the Commission may condemn even a compensatory rate if it is "aimed at destroying a competitor" (Railroad Appellees' Brief, p. 28). Their argument now rests on the hope that this Court will follow the District Court in overlooking the facts

showing the rail rate cut in issue here was indeed aimed at destroying a bargeline competitor.

The Commission's finding that at the $5.11 rate "rail respondents virtually concede that all of the traffic would move by rail" (J.A. 64) is now countered by the assertion of railroad counsel that this reduction only gave "the shipper a choice of two competitive services at the same price" (Railroad Appellees' Brief, p. 37). The fact that the competing bargeline would have to undercut the rail $5.11 rate to participate in this traffic, and the fact that the bargeline can not recapture this traffic by such a reduction because the rails' out-of-pocket costs are lower than the barges' (J.A. 71) are all facts that are ignored instead of disputed.

Railroad counsel assert in the face of these facts that the $5.11 rate was not predatory "in the sense that it is aimed at the destruction of a competitor or involves unfair pricing practices" (Railroad Appellees' Brief, p. 6). They suggest, but do not argue, that this deliberate pre-emption of traffic vital to a competitor's survival was not predatory because the Commission failed to find that the $5.11 rail rate was "maliciously conceived" (*Id.* at 43, footnote 102).

Intermodal competition can not be protected against destructive rate-cutting by probing the minds of railroad rate makers for evidence of malice. Here, objective evidence shows that (1) the existing rate was cut by more than half (11.86 to 5.11) to a level where the ratio (109) of the rate to out-of-pocket costs fell far below the average ratio (152) for other manufactured products (J.A. 144); (2) revenues from transportation of the particular class of manufactured products involved "is of far more consequence to the barges than

to the railroads" (J.A. 68); (3) the cut rate captured all of this traffic for the railroads (J.A. 64); and (4) the bargelines can not recapture the traffic by engaging in a rate battle with the railroads (J.A. 71).

If these facts do not justify the Commission's conclusion that the reduction threatened the ability of the competing bargelines "not only to compete but to exist" (J.A. 68), an additional finding of malicious conception could not do so. The railroad appellees' own argument as to the meaning of the statute assumes, as do the appellants' arguments, that Congress authorized the Commission to protect intermodal competition by appraising the economic consequences of a rate cut—not by applying the law of malicious torts.

2. The Justice Department's brief, on the other hand, claims that there is no prospective Commission remedy against a predatory rail rate that is compensatory. According to its brief, the Commission lacks power to suspend such a rate aimed at the destruction of bargelines and may only prevent the railroad from increasing the destructive rate "after the barge competition had been destroyed" (Brief for the United States, p. 13). The Department argues that instead of preventive action pursuant to section 15a(3) of the Act the Commission should rely upon section 4(2) to deny to the railroads the privilege of increasing the destructive rate after it had accomplished the objective of destroying a competing water carrier.

The authors of the Justice Department brief seem to assume that the only provision allowing prospective condemnation of predatory rates is 49 U.S.C. § 15(1), which prohibits non-compensatory rates, regardless of their purpose. *State of New York* v. *United States,*

331 U.S. 284, 346 (1947). The fact is that the issue of predatory purpose normally arises in a proceeding under 49 U.S.C. § 15a(3). There is no occasion to invoke 15a(3) unless the allegedly destructive rate exceeds out-of-pocket costs, as a rate below that level is prohibited by 15(1) and 15a(2). Thus, the Department's notion that, in the absence of a non-compensatory rate, a market free from Commission interference should determine intermodal cost advantages, rests upon a failure to comprehend the statutory framework for Commission regulation of rates.

In *Interstate Commerce Commission* v. *New York, N.H. & H.R.R. Co.*, 372 U.S. 744 (1963), the Justice Department filed a brief that, while disagreeing with the Commission, carefully considered the background and purpose of the 1958 amendment to section 15a(3), as applied to the facts of rail-water competition. The Justice Department then concluded that a water carrier should in all circumstances receive Commission protection against any rail rate reduction that would impinge upon a water carrier's inherent cost advantage, measured by fully distributed costs. (Brief for the United States, pp. 21, 40-41, No. 108, *et al.*, Oct. Term). This Court apparently regarded that formula as too rigid, but, as all parties concede, this Court did not rule out the use of fully distributed costs for this purpose. Instead of addressing itself to the facts thought by the Commission in this case to justify a fully distributed cost comparison to determine the low-cost carrier, the Justice Department has chosen to join the railroads in their effort to achieve now what they were denied in *New Haven; i.e.*, total elimination of fully distributed cost comparisons in all cases where rail-water competition is involved. We do not question

the Justice Department's right to reverse its position, although repudiation of an argument as to the meaning of a statute normally does not occur in the very next case presenting the same question. We do suggest, however, that the failure of the Department's current brief to describe accurately the statutory basis of the Commission's power makes the Department's brief in *New Haven* a more useful aid to a correct decision here than the Department's present brief.

Respectfully submitted,

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